AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KOREA AND THE GOVERNMENT OF MALAYSIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

Signed at Seoul April 11, 1988

Entered into force March 31, 1989

The Government of the Republic of Korea and the Government of Malaysia (hereinafter referred to as the Contracting Parties);

Bearing in mind the friendly and cooperative relations existing between the two countries and their peoples;

Intending to create favourable conditions for investments by nationals and companies of one Contracting Party in the territory of the other Contracting Party on the basis of sovereign equality and mutual benefit; and

Recognising the need to promote and protect such investments of both countries with a view to fostering the economic prosperity of both countries;

Have agreed as follows:

Article 1. Definitions

For the purpose of this Agreement:

(a) "nationals" means: (i) With respect to the Republic of Korea, physical persons who are deemed to be nationals of the Republic of Korea in accordance with its laws;

(ii) With respect to Malaysia, any person who is a citizen of Malaysia according to its Constitution.

(b) "companies" means: (i) With respect to the Republic of Korea. juridical persons or companies or associations, whether or not with limited liability and whether or not for pecuniary profit, incorporated in the territory of the Republic of Korea and existing in accordance with its laws;

(ii) With respect to Malaysia, any company with or without limited liability incorporated in the territory of Malaysia, or any juridical person or any association of persons or partnership of sole proprietorship lawfully constituted in accordance with the law in force in any part of the territory of Malaysia.

(c) "investments" means every kind of asset and, in particular, though not exclusively, includes: (i) Movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) Shares, stocks and debentures of companies or interests in the property of such companies;

(iii) Claims to money or to any performance under contract having a financial value;

(iv) Intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets, technical processes and know-how and goodwill;

(v) Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

The said term "investments" shall refer:

(i) With respect to investments in the territory of the Republic of Korea, to all investments made in accordance with the legislation and administrative practice of the Republic of Korea; and

(ii) With respect to investments in the territory of Malaysia, to all investments made in projects classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an "approved project".

Any alteration of the form in which assets are invested shall not affect their classification as investments, provided that such alteration is not contrary to the approval, if any, granted in respect of the assets originally invested.

(d) "returns" means the amount yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties or fees.

(e) "territory" means: (i) With respect to the Republic of Korea, the territory over which the Republic of Korea has sovereignty or jurisdiction;

(ii) With respect to Malaysia, all land territory comprising the Federation of Malaysia, the territorial sea and airspace above.

(f) "freely usable currency" means the United States Dollar, or Pound Sterling, Deutschemark, French Franc, Japanese Yen or any other currency that is widely used to make payments for international transactions and widely traded in the international principal exchange markets.

Article 2. Promotion and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest in its territory, and subject to its rights to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of nationals or companies of either Contracting Party shall at all time be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

Article 3. National and Most-favoured Nation Treatment

(1) Investments of nationals or companies of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall receive treatment which is fair and equitable and not less favourable than that accorded in respect of the investments and returns of the nationals and companies of the latter Contracting Party or of any third State. However, with respect to investments and returns in banking and insurance sectors, such treatment shall be accorded in compliance with the relevant laws and regulations of each Contracting Party.

(2) Each Contracting Party shall in its territory accord to nationals or companies of the other Contracting Party as regards the management, use, enjoyment or disposal of their investments, treatment which is fair and equitable and not less favourable than that which it accords to its own nationals and companies or to the nationals and companies of any third State.

Article 4. Exceptions

The provisions of this Agreement relative to the granting of treatment not less favourable than that accorded to nationals or companies of any third State shall not be construed so as to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of:

(a) Any existing or future customs union or free trade area or a common external tariff area or a monetary union or similar international agreement or other forms of regional cooperation to which either of the Contracting Parties is or may become a party; or

(b) The adoption of an agreement designed to lead to the formation or extension of such a union or area within a reasonable length of time; or

(c) Any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

Article 5. Compensation for Losses

(1) Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords

to its own nationals or companies or to nationals or companies of any third State.

(2) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from:

(a) Requisitioning of their property by its forces or authorities, or

(b) Destruction of their property by its forces ox authorities which are not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

Article 6. Expropriation

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose. The expropriation shall be carried out under due process of law, on non-discriminatory basis and shall be accompanied by the provision for the payments of prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before expropriation or impending expropriation became public knowledge, shall include interest from the date of expropriation, shall be made without delay, be effectively realizable and be freely transferable.

The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph. (2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

Article 7. Repatriation of Investment

(1) Each Contracting Party shall, subject to its laws and regulations, allow without unreasonable delay the transfer in any freely usable currency, payments resulting from investment activities:

(i) The net profits, dividends, royalties, technical assistance and technical services fees, interest and other current income, accruing from any investment of the nationals or companies of the other Contracting Party;

(ii) The proceeds from the total or partial liquidation of any investment made by nationals or companies of the other Contracting Party;

(iii) Funds in repayment of borrowings by nationals or companies of one Contracting Party from the nationals or companies of the other Contracting Party, which both Contracting Parties have recognised as investment; and

(iv) The earnings of nationals of either Contracting Party who are allowed to work in connection with an investment in the territory of the other Contracting Party.

(2) The exchange rates applicable to such transfer in the paragraph (1) of this Article shall he the rate of exchange prevailing at the time of remittance.

(3) The Contracting Parties undertake to accord to transfer referred to in paragraph (1) of this Article a treatment as favourable as that accorded to transfer originating from investment made by nationals or companies of any third State.

Article 8. Subrogation

If a Contracting Party makes a payment to any of its nationals or companies under a guarantee it has granted in respect to an investment, the other Contracting Party shall, without prejudice to the rights of the former Contracting Party under Article 9, recognise the transfer of any right or title or such national or company to the former Contracting Party and the subrogation of the former Contracting Party to any right or title.

Article 9. Settlement of Investment Disputes between a Contracting Party and a National or Company of the other Contracting Party

(1) Each Contracting Party consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party which involves:

(i) An obligation entered into by that Contracting Party with the national or company of the other Contracting Party regarding an investment by such national or company; or

(ii) An alleged breach of any right conferred or created by this Agreement with respect to an investment by such national or company.

(2) A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25 (2) (b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.

(3)

(i) If any dispute of the type referred to in paragraph (1) should arise, the Contracting Party and the national or company concerned shall seek to resolve the dispute through consultation and negotiation. If the dispute cannot thus be resolved within three (3) months, then if the national or company concerned also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either Contracting Party to the dispute may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as set forth in Articles 28 and 36 of the Convention, provided that the national or company concerned has not submitted the dispute to the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Contracting Party that is a party to the dispute.

(ii) In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure, the opinion of the national or company shall prevail. The Contracting Party which is a party to the dispute shall not raise as an objection, defence, or right of set-off at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received or will receive, pursuant to an insurance or guarantee contract, an indemnity or other compensation for all or part of his or its losses or damages.

(4) Neither Contracting Party shall pursue through diplomatic channels any dispute referred to the Centre unless:

(a) The Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre; or

(b) The other Contracting Party shall fail to abide by or to comply with any award rendered by an arbitral tribunal.

Article 10. Settlement of Disputes between Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through diplomatic channels.

(2) If a dispute between the Contracting Parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too, is prevented from discharging the said function the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decisions by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of cost shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

Article 11. Application to Investment

The Agreement shall apply to investments made in the territory of either Contracting Party in accordance with its legislation, rules or regulations by nationals or companies of the other Contracting Party prior to as well as after the entry into force of this Agreement.

Article 12. Entry Into Force, Duration and Termination

(1) This Agreement shall enter into force thirty (30) days after the date on which the Governments of the Contracting Parties have notified each other that their constitutional requirements for the entry into force of this Agreement have been fulfilled.

(2) This Agreement shall remain in force for a period of ten (10) years, and shall continue in force, unless terminated in accordance with paragraph (3) of this Article.

(3) Either Contracting Party may, by giving one (1) year's written notice to the other Contracting Party, terminate this Agreement at the end of the initial ten (10) year period or anytime thereafter.

(4) With respect to investments made or acquired prior to the date of termination of this Agreement, the provisions of all of the other Articles of this Agreement shall continue to be effective for a period of ten (10) years from such date of termination.

IN WITNESS WHEREOF, the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at Seoul this 11th day of April 1988 in the Korean, Bahasa Malaysia, and English languages, all three texts being equally authentic. In the case of divergence between the texts of this Agreement, the English text shall prevail.

FOR THE GOVERNMENT OF THE REPUBLIC OF KOREA

FOR THE GOVERNMENT OF MALAYSIA